

REMARKS

Claims 1, 5-12, 16, 17, and 21 have been amended. Claims 1-21 remain pending in the application. Reconsideration is respectfully requested in light of the following remarks.

Section 101 Rejection:

The Examiner rejected claim 11 under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter. The Examiner asserts “claim 11 recites a ‘system means’; however, it appears that the system would reasonably be interpreted...as software per se, failing to be tangibly embodied or include any recited hardware as part of the system.”

The elements of claim 11 are all expressed as means for performing a specified function. Applicants remind the Examiner that under 35 U.S.C. § 112, paragraph 6, **by statutory definition**, a means claim must be construed to include the structure that performs the corresponding function. Thus, a means claim **cannot be construed as software per se**.

Contrary to the Examiner’s assertion that “claim 11 recites a ‘system means’”, claim 11 actually recites *a system, comprising means for creating a plurality of client-side Object Request Brokers (ORBs) for a client of an application server on a client machine*. Corresponding structure for the means as recited in claim 11 may be found in the drawings and specification, e.g. in FIG. 1 and FIG. 2 and the description of FIG. 2 beginning on page 9 at line 26, which recites in part:

Client system 200 may be any of various types of devices, including, but not limited to, a personal computer system, desktop computer, laptop or notebook computer, mainframe computer system, workstation, network computer, or other suitable device... Client system 200 may couple over a network to one or more other devices via one or more wired or wireless network interfaces, such as one or more host machines each hosting one or more application server instances.

Thus, claim 11 must be “construed to cover the corresponding structure” as indicated in 35 U.S.C. § 112, paragraph 6, which according to Applicants’ specification includes a physical device.

In the Advisory Action of January 31, 2008, Examiner maintains the assertion that “it is entirely possible for the corresponding disclosed ‘means’ to cover an embodiment of software alone...” **Applicants refer the Examiner to MPEP 2106.II.C** (emphasis added):

Where means plus function language is used to define the characteristics of a machine or manufacture invention, claim limitations **must** be interpreted to read on **only the structures or materials** disclosed in the specification and "equivalents thereof." (Two en banc decisions of the Federal Circuit have made clear that the Office is to interpret means plus function language according to 35 U.S.C. 112, sixth paragraph. In the first, In re Donaldson, 16 F.3d 1189, 1193, 29 USPQ2d 1845, 1848 (Fed. Cir. 1994), the court held:

The plain and unambiguous meaning of paragraph six is that **one construing means-plus-function language in a claim must look to the specification and interpret that language in light of the corresponding structure, material, or acts described therein, and equivalents thereof, to the extent that the specification provides such disclosure.** Paragraph six does not state or even suggest that the PTO is exempt from this mandate, and there is no legislative history indicating that Congress intended that the PTO should be. Thus, this court must accept the plain and precise language of paragraph six.

Consistent with Donaldson, in the second decision, In re Alappat, 33 F.3d 1526, 1540, 31 USPQ2d 1545, 1554 (Fed. Cir. 1994) (in banc), the Federal Circuit held:

Given Alappat's disclosure, **it was error for the Board majority to interpret each of the means clauses in claim 15 so broadly as to "read on any and every means for performing the function" recited,** as it said it was doing, and then to conclude that claim 15 is **nothing more than a process claim** wherein each means clause represents a step in that process. Contrary to suggestions by the Commissioner, this court's precedents do not support the

Board's view that the particular apparatus claims at issue in this case may be viewed as nothing more than process claims.

In the Advisory Action of January 31, 2008, Examiner asserts “virtual machines are software systems and can constitute the system.” Applicants note that virtual systems are always implemented on an underlying hardware (“structure or material”) infrastructure or system. **There is no such thing as a purely “software” system without underlying structure or material.** Applicants’ specification recites underlying “structure or material”, and the Examiner’s § 101 rejection of claim 11 is clearly improper per MPEP 2106.II.C as quoted above.

Also, Applicants note that claim 11 has been amended to recite *means for creating a plurality of client-side Object Request Brokers (ORBs) on a client machine for a client of an application server, wherein the client is on the client machine; and means for selecting from the plurality of client-side ORBs on the client machine.*

Therefore, for at least the reasons presented above, the § 101 rejection of claim 11 is improper and removal thereof is respectfully requested.

Section 103(a) Rejection:

The Examiner rejected claims 1, 5, 6, 10-12, 16, 17 and 21 under 35 U.S.C. § 103(a) as being unpatentable over Gigliotti et al. (U.S. Patent 6,393,458) (hereinafter “Gigliotti”). Applicants respectfully traverse this rejection for at least the following reasons.

In previous Actions, Examiner cited multiple passages from the Gigliotti reference in asserting that Gigliotti teaches the limitations of claim 1. However, as discussed in Applicants' previous Responses, Gigliotti fails to teach these limitations. Applicants maintain these traversals in regard to amended claim 1.

In further regard to claim 1, in the Advisory Action of January 31, 2008, Examiner asserts “Gigliotti’s client and load balancer is equivalent to Applicant’s client. Applicant’s claim 1 recites ‘one or more client computer systems configured to implement one or more clients of the application server.’ This allows for more than one computer system to implement a single client.” This assertion appears throughout the Advisory Action, and appears to be Examiner’s main point of argument. Claim 1 has been amended to recite:

one or more client machines each configured to implement one or more clients of the application server, wherein each client on a respective one of the one or more client machines is configured to: create a plurality of client-side Object Request Brokers (ORBs) on the client machine...[and] select one of the plurality of client-side ORBs on the client machine according to a load balancing scheme in response to a request to access the application server

Applicants’ amendments clarify that each client is implemented on a respective individual client machine, that one of the plurality of client-side ORBs on the client machine is selected. Thus, the Examiner’s interpretation is no longer applicable. Similar amendments were made to the other independent claims.

For at least the reasons presented above, the rejection of claim 1 is not supported by the cited art and removal thereof is respectfully requested. Similar remarks as those above regarding claim 1 apply to claims 6, 11, 12, and 17.

The Examiner rejected claims 2-4, 7-9, 13-15 and 18-20 as being unpatentable over Gigliotti in view of Applicant’s Admitted Prior Art (hereinafter “AAPA”). As the rejection of the independent claims have been shown to be unsupported by the cited art, no further comments in regard to these claims is necessary at this time.

Applicants also assert that the rejection of numerous ones of the dependent claims is further unsupported by the cited art. However, since the rejections have been shown to be unsupported for the independent claims, a further discussion of the dependent claims is not necessary at this time.

CONCLUSION

Applicants submit the application is in condition for allowance, and notice to that effect is respectfully requested.

If any fees are due, the Commissioner is authorized to charge said fees to Meyertons, Hood, Kivlin, Kowert, & Goetzel, P.C. Deposit Account No. 501505/5681-71800/RCK.

Respectfully submitted,

/Robert C. Kowert/
Robert C. Kowert, Reg. #39,255
Attorney for Applicants

Meyertons, Hood, Kivlin, Kowert, & Goetzel, P.C.
P.O. Box 398
Austin, TX 78767-0398
Phone: (512) 853-8850

Date: February 11, 2008